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Supreme Court of the United States

OCTOBER TERM 1948

No. 683

GEORGE W. HARTMANN,

Petitioner,

—against—

THE AMERICAN NEWS COMPANY, a Delaware corporation,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM D. WHITNEY,
Counsel for Respondent.

HAROLD R. MEDINA, JR.,
SAN W. ORR,
Of Counsel.

May 2, 1949.

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Opinion Below

The opinion of the Court of Appeals for the Seventh Circuit (R. 448-57*) with respect to which certiorari is sought is reported at 171 F. (2d) 581. On January 4, 1949, the Court of Appeals denied a petition for rehearing (R. 458).

Statement

The decision which petitioner seeks to review affirmed a judgment of the District Court entered upon a jury verdict returned for respondent.

The controversy is the outgrowth of an article published by Time Inc. in its magazine Life dated January 17, 1944.

*All references are to pages of the Record.

The article in question (Ex. A, R. 245-55) described various groups of persons who were resisting the war effort, including a group known as "Peace Now" of which petitioner was the chairman. After the appearance of the article petitioner wrote a letter of protest to Time Inc., which letter was published in part in the February 7, 1944 issue of Life together with an editorial comment thereon (Ex. B, R. 256-7). It is petitioner's contention that he was libeled by both articles.

Time Inc. is not a party to the lawsuit. Respondent is The American News Company, a corporation engaged in the business of distributing periodicals for various publishers. Its arrangement with Time Inc. was that it would purchase copies of Life, distribute them to newsdealers, and resell to Time Inc. any copies of Life which were not successfully disposed of (R. 194).

Petitioner is a highly educated middle-aged professor of educational psychology at Teachers College, Columbia University. He has had wide experience in public speaking. He was Socialist candidate for Congress in 1934 in Pennsylvania, Socialist candidate for judge of the Supreme Court of the Commonwealth in 1935 in Pennsylvania, Socialist candidate for the office of Lieutenant Governor in 1938 in New York, and Socialist candidate for Mayor in 1941 in New York City (R. 67).

On July 9, 1943, petitioner and various associates formed the Peace Now movement. The activities of Peace Now consisted of publicizing its opposition to the war effort and to the national administration (R. 43-4 and see Ex. 20, R. 302). Many of the statements issued by the Peace Now movement were inflammatory in nature and were calculated to impede the war effort (e. g. Ex. 5, R.

291, Ex. 11, R. 292; Ex. 13, R. 298; Ex. 16, R. 300). Such objections precipitated criticisms of Peace Now by various newspapers and magazines, other than Time Inc., both prior and subsequent to the Life articles of which complaint is made (e. g. Ex. 28, R. 304).

In the statement of facts appearing in petitioner's brief on pages 29-30 all of his troubles are attributed to the publication of the Life article. Yet:

(a) In almost identical language describing his troubles, petitioner, during a suit against the Philadelphia Inquirer over the publication of another article, attributed his troubles to an article which appeared in the Philadelphia Inquirer (R. 142).

(b) In a suit against the Boston Herald, petitioner, in almost identical language, described his troubles and attributed them to an article which appeared in the Boston Herald (R. 142-143). The article published in the Boston Herald had been published on January 30, 1944, thirteen days subsequent to the Life article; but at the Boston trial petitioner testified that prior to the publication of the Boston Herald article, to wit, January 30, 1944, his relations with his students and the faculty had been "cordial and pleasant" (R. 143), and that the Boston Herald article had been the primary cause of his troubles (R. 144).

(c) Subsequent to the Wisconsin trial petitioner, when testifying in a suit brought by him against the New York Daily Mirror, in almost identical language described his troubles and attributed them to an article which appeared in that newspaper in New York.

Examples of the literature published or circulated by personnel of Peace Now as proved at the trial, are set forth in the amended answer of respondent (R. 14-18).

The Life article was a truthful report of his activities and free from any misrepresentation. Petitioner was obviously out of step with his Government and its Allies in a time of national crisis. His activities were of such a character that a truthful report of them would naturally cause most people to shun the petitioner. In the words of Dean Russell of Teachers College, Columbia University, who testified for respondent, petitioner's activities were such that he "cooked his own goose" (R. 146).

Life magazine is a news picture magazine. It was engaged in the business of reporting matters of public interest (R. 177). No one connected with Time Inc., so far as its publisher knew, was acquainted with petitioner (R. 177). Its purpose in writing the article was "the journalistic purpose of reporting events as we see them" (R. 177). The magazine was not engaged in any campaign of vilification of persons who objected to the war policies of the United States Government (R. 177). Life magazine considered that the Peace Now movement sought to create popular distrust of the war leaders and national policy of the United States and its Allies (R. 177). It considered that articles published by the Peace Now movement were dangerous and subversive (R. 174-5). "At a time when the country was straining every effort to win the war these widely publicized attempts to arouse the people in favor of an immediate peace were certainly destructive of the war effort" (R. 175).

In December 1943 three newsworthy events occurred with respect to persons or groups of persons who were opposed to the war effort. Life magazine reported upon

the incarceration of persons who had sought to arouse insubordination in the Army and Navy, upon the indictment of certain Fascists, and upon the activities of Peace Now in a single article as it considered the three news stories to constitute related events (R. 181). Its article in so far as it related to Peace Now was a description of the Peace Now movement. As appears from an inspection of the article (R. 245) emphasis was placed on describing the movement, and Hartmann is mentioned only incidentally as chairman of the movement together with other people who were active in Peace Now. The slug "U. S. Indicts Fascists (continued)" was used as a common printers' device for the sole purpose of associating related events (R. 181). The use of such a printers' device is a common practice, as conceded by petitioner's counsel (R. 123), and is almost a matter of common knowledge, as stated by the Trial Court (R. 123).

The basic question now before this Court is whether petitioner presents any sound reason for a further review of the case. Petitioner has not suggested any such reason. His argument is an attempt to obtain a review by this Court of questions which were presented neither to the District Court nor to the Court of Appeals. The petition does not raise any question of public or general interest.

QUESTION PRESENTED

Did the Wisconsin District Court, as affirmed by the Court of Appeals, follow the law of Wisconsin in its conduct of the trial?

SUMMARY OF ARGUMENT

1. The District Court correctly submitted to the jury the question of whether the article sued upon could be construed to be libelous and the question of respondent's freedom from negligence.

2. The District Court did not err in the admission of evidence.

3. The question of the sufficiency of the evidence was not presented to the District Court or to the Court of Appeals and is not before this Court.

ARGUMENT

Point I.

THE QUESTION OF WHETHER OR NOT PETITIONER HAD BEEN LIBELED WAS PROPERLY SUBMITTED TO THE JURY.

No proper objection sufficient to raise this point on appeal in the Court of Appeals or this Court was made at the trial. The point is founded upon purported errors in instruction given to the jury ("contested issues" 3-6, 9-10, petitioner's brief pp. 19-20) and in instructions which were refused ("contested issues" 2, 4, 6, 8-10, 21-3, petitioner's brief pp. 19-21). Yet no proper objection was made either to the instructions given (*Palmer* v. *Hoffman,* 318 U. S. 109) or with regard to refusal to charge instructions requested (*Thiede* v. *Utah,* 159 U. S. 510). See Federal Rule of Civil Procedure 51.

It is the law of Wisconsin that where an allegedly libelous article is subject to both a libelous and a non-libelous meaning it is for the jury to say which meaning would have been ascribed to it by the ordinary reader. The court merely passes upon the capability of the language to convey the libelous meaning. The jury determines whether or not such meaning would be conveyed to the ordinary reader. If there is "substantial doubt" as to the meaning which an ordinary reader would accord the article, then it is a jury question. See *Judevine* v. *Benzies-Montanye Fuel and Whole-Sale Co.*, 222 Wis. 512, 517, 269 N. W. 295; *Leuch* v. *Berger*, 161 Wis. 564, 570, 155 N. W. 148; *Hoan* v. *Journal Co.*, 238 Wis. 311, 329, 298 N. W. 228; *Arnold* v. *Ingram*, 151 Wis. 438, 456, 138 N. W. 111; *Woods* v. *Sentinel-News Co.*, 216 Wis. 627, 629, 258 N. W. 166. In *York* v. *Cole*, 190 Wis. 179, 181, 208 N. W. 944, 945, the court said that if the article is unambiguous, the question of libel is for the court, but if there is a "reasonable possibility" of a libelous meaning, a jury question is presented.

Moreover, it is well settled in Wisconsin that in determining whether or not a particular article is libelous the headlines must be interpreted in the light of the body of the article read as a whole, unless the headlines in and of themselves identify the plaintiff. In *Schoenfeld* v. *Journal Co.*, 204 Wis. 132, 137, 235 N. W. 442, the headline was "Warrant for Pastor in Fur Thefts." The jury found, and the court sustained the finding, that such article was not libelous. In *Woods* v. *Sentinel-News Co.*, 216 Wis. 627, 258 N. W. 166, the same rule was applied where the headline read "Cops Free 'Robber' But Hold His Wife!"

In submitting this case to the jury the Trial Court expressly told the jury what petitioner contended the

article meant (R. 220), and then left it to the jury "to say what a person of average intelligence and comprehension would have understood by reading said articles" (R. 220).

Petitioner also argues that the question of respondent's alleged negligence should not have been submitted to the jury (Br. pp. 54-56). The contrary rule is settled. *Street* v. *Johnson,* 80 Wis. 455, 50 N. W. 395.*

There was no proof of malice in this case. It is undisputed that neither respondent nor any of its employees knew petitioner at the time of the publications complained of (R. 194). They were merely an impersonal conduit between publisher and reader, as free from intent of injuring petitioner as the engineer on the train that hauled the magazines from Chicago.

Petitioner's argument that custom of an industry does not relieve respondent from liability ignores the Court's instruction on the subject. The Court told the jury (R. 223):

> "In determining whether a reasonable man in the position of the defendant would have attempted to procure such knowledge prior to distribution of the magazines, you are instructed that you may consider, as an element, the care exercised by other persons who are engaged in the same business as the defendant. If the distribution of these magazines by the defendant was made in the usual and cus-

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*The *Street* case is in accord with modern authority in that it discharges a periodical distributor from liability if he distributed the periodicals without knowledge of their contents and if he was not negligent in his failure to have such knowledge. See *Bowerman* v. *Detroit Free Press,* 278 Mich. 443, 283 N. W. 642; *Albi* v. *Street & Smith Publications,* 140 F. 2d 310 (CCA 9).

tomary way established by the industry, you may consider that fact in determining whether ordinary care was exercised by the defendant."

It is the law of Wisconsin that where a question of negligence is involved, evidence of custom is admissible. *Sprecher* v. *Roberts,* 212 Wis. 69, 74, 248 N. W. 795: *Stasek* v. *Banner Coffee Co.,* 164 Wis. 538, 540, 159 N. W. 945; *Reiner* v. *Mandernack,* 234 Wis. 568, 571, 573, 291 N. W. 758; *Eich* v. *Brennan,* 223 Wis. 174, 176, 270 N. W. 47.

Point II.

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN RULING ON THE ADMISSION OF EVIDENCE.

Petitioner complains (Br. pp. 74-6) of the admission of Exhibits 54, 72 through 77, 79, 80, 84, 85 and 86, and also of the admission of Exhibits 56, 58 through 61 and 63 through 71. We will not argue the admissibility of those exhibits for the reason that none of them were objected to. As proof of the fact that they were not objected to, we here supply the Record pages omitted in petitioner's brief:

As to Exhibit 54—see Record 138;
As to Exhibit 72—see Record 130;
As to Exhibit 73—see Record 131, 146 and 147;
As to Exhibit 74—see Record 124, 146 and 147;
As to Exhibit 75—see Record 127;
As to Exhibit 76—see Record 128;
As to Exhibit 77—see Record 131, 146 and 147;
As to Exhibit 79—see Record 146;
As to Exhibit 80—see Record 147;
As to Exhibit 84—see Record 146 and 147;

As to Exhibit 85—see Record 68;
As to Exhibit 86—see Record 147;
As to Exhibits 56, 64, 67 and 70—see Record 147;
As to Exhibits 58, 59, 60, 61, 65, 66, 68 and 69—see Record 209;
As to Exhibit 63—see Record 143.

The unreliability of petitioner's brief is illustrated by his complaint in "contested issue" number 19 over the admission of Exhibit 78 and in "contested issue" number 20 over the admission of Exhibit 71. Exhibit 78 was never offered in evidence, and petitioner's objection to Exhibit 71 was sustained and it was not received in evidence.

The Dies report (Ex. 57, R. 84-102) was correctly received in evidence. Respondent sought to show, as bearing on the question of whether or not petitioner's illness and discharge were caused by the publications in Life magazine, that numerous other articles concerning petitioner and his activities have been published, including the Dies report. Petitioner testified that his illness and his discharge from Columbia University occurred in May, 1944 (R. 64). He also testified that his illness and his discharge from Columbia University were caused by the publication in Life magazine. The force of the Dies report as tending to explain petitioner's illness and discharge—especially when it is remembered that it was published by a Congressional committee—is fully set forth in petitioner's own brief (p. 65).

It was pointed out to the Trial Court, when the exhibit was admitted in evidence, that it was admissible because of such illness and such loss of job (R. 84).

However, the complete answer to this section of the brief lies in the Court's ruling when the exhibit was admitted (R. 84). The Court said

> "Well, I was going to say it may or may not be relevant. I think I will overrule the objection, without prejudice to your renewing it again at the end of the trial if you think it has not been connected up in any way."

In this state of the record, and in view of the importance which petitioner now seeks to attach to the admission of the exhibit, it was petitioner's duty to renew his objection at the end of the trial. He did not do so. Nor did he move to have the jury instructed to disregard the exhibit. Nor did he ask to have the exhibit restricted to a special use or to have the jury instructed that the exhibit should be considered for only a special purpose. Nevertheless, the Court in instructing the jury only mentioned the Dies Committee report in connection with the subject of damages (R. 225).

The law is clear that where testimony is admitted subject to objection, or admitted on the promise that it will be later connected up, it is necessary that the objection be renewed or there is a waiver of the objection.

Petitioner complains of the admission in evidence of Collett's conviction for voyeurism and of Dutko's conviction for absenting himself illegally from a Civilian Public Service Camp. The Trial Court's ruling was patently correct. On cross-examination, petitioner had testified that to his knowledge the organizers of the Peace Now Movement were "loyal American citizens, patriotic, respectable, law abiding" (R. 67). He also testified that the temporary committee included John Collett as field secretary, that Collett had assisted in the formation of the Peace Now Movement (R. 68), and that Dutko was sent $100 to further the Peace Now aims in Chicago (R. 79). In that situation,

the fact that Collett and Dutko were not respectable and law-abiding was obviously admissible for purposes of impeachment and hence was relevant.

In fact, the court did not need to (as it did) restrict the evidence to impeachment purposes, since the character of the Peace Now Movement and the persons comprising it was in issue, and consequently respondent was entitled to demonstrate the type of person connected with the movement.

Petitioner's long diatribe relative to the admission of President Roosevelt's report to Congress (Ex. 144, R. 208) is quickly answered. Petitioner testified (R. 203) that the war had already been won in July of 1943. The President's report to Congress was delivered on September 17, 1943 and disclosed the state of the war at that time. It was a summation of the military situation facing the country by the Commander in Chief of the armed forces and showed that the country faced a grave peril. The speech was the President's report to Congress, as indicated on the face of the exhibit, and the exhibit itself was certified to be a copy of a portion of the Congressional Record of the 78th Congress (R. 349). As appears from the certificate, the speech was contained in a book printed by authority of the United States of America and hence was admissible under section 327.02 of the Wisconsin Statutes. The speech was the report of a public officer and hence was admissible under section 327.18 of the Wisconsin Statutes. It was of such wide notoriety that it could have been judicially noticed. Law of Evidence in Civil Cases by Burr W. Jones, 4th edition, 1938, Volume I, section 122, page 209.

One of the purposes for which it was introduced was to show the environment in which Peace Now operated (R.

208). For that purpose it was immaterial whether the statements made in the speech were true or not. The *fact* that the speech had been delivered was an independently relevant fact, since it supported respondent's claim that the Peace Now Movement was dangerous and subversive to a united effort to gain a worthwhile peace.

Point III.

THE QUESTION OF THE SUFFICIENCY OF THE EVIDENCE IS NOT BEFORE THIS COURT.

After verdict, petitioner moved for a judgment notwithstanding the verdict or in the alternative for a new trial (R. 369). At no time did petitioner move for a directed verdict or request the court to refuse to submit any of the defenses asserted by the respondent.

It is not clear whether petitioner is now assigning the Trial Court's refusal to grant a new trial as error, or whether he is simply asking this Court to weigh the evidence. It is clear however, that this Court has neither the power nor the duty to retry this lawsuit. Petitioner is in much the same position as the appellant in *Sturm* v. *Chicago N. W. Railway Co.*, 157 F. 2d 407 (CCA 8), where the Court said:

> "It is obvious that this appeal presents no question which is reviewable by this court. No ruling of the trial court is challenged. The question of the sufficiency of the evidence to support the verdict is not subject to review, since that question was not presented to the trial court by a motion for a directed verdict or any other equivalent action. * * * This court is without power to retry this case. It cannot

> concern itself with the credibility of witnesses or the weight of evidence."

The necessity that any motion testing the sufficiency of the evidence be preceded by a motion for a directed verdict is unquestionable. It is required by Rule 50(b) of the Federal Rules of Civil Procedure and the courts have repeatedly declared that such a motion is a prerequisite. In *Edwards* v. *Craig,* 138 F. 2d 608 (CCA 7), the Court said:

> "Since the defendant-appellant made no motion for a directed verdict, the insufficiency of the evidence cannot be raised here."

It is contemplated that these rules will be adhered to. In *United States* v. *Harrell,* 133 F. 2d 504, 506 (CCA 8) the Court declared:

> "If the requirement that the Rules of Civil Procedure shall govern appeals from judgments in condemnation cases is to be given effect, questions for review by federal appellate courts must be preserved in the manner prescribed by those rules. The required procedure for testing on appeal the sufficiency of the evidence is by motion for a directed verdict at the close of all the evidence. Rule 50, Rules of Civil Procedure. It has been held in a case tried under the Conformity Act, 28 U. S. C. A. § 724, that Rule 50 'does not do away with but emphasizes the necessity of a motion for a directed verdict to raise [on appeal] the legal question whether the evidence is sufficient.' "

A party should not be permitted to gamble on the outcome of a jury verdict, and if it goes against him, then to contend that there is no evidence to support such a verdict.

On motions after verdict the trial judge, a judge of considerable trial experience, made the following statement:

> "I thought the jury was an intelligent jury. I didn't know any of them. I was called in to try the case, to sit for Judge Stone, but as I watched them for over a week—not over a week, but nearly a week, they seemed to me to be good, average, intelligent and honest jurors.
>
> "Now, this is a case where I think the plaintiff had a fair trial. The jury decided contrary to the plaintiff's contentions. The fact that the plaintiff did not win, of course, naturally, they feel quite badly about that, I assume, but I don't think that means that there was any passion or prejudice shown on the part of the jury, and I do not think that the verdict is inconsistent with substantial justice."

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WILLIAM D. WHITNEY,
Counsel for Respondent.

HAROLD R. MEDINA, JR.,
SAN W. ORR,
Of Counsel.

May 2, 1949.